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In the Supreme Court

OF THE

United States

OCTOBER TERM 1969

No. [redacted] 100

GUIDO IOZZI, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Fourth Circuit

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Fourth Circuit

Guido Iozzi, Jr. petitions for a Writ of Certiorari to review the judgment of the Court of Appeals for the Fourth Circuit entered in this case on January 12, 1970. Rehearing denied below on February 2, 1970.

OPINION BELOW

The opinion of the Court of Appeals (App. *infra*, pp. .....) is reported at ..... F.2d ..... (1970).

STATEMENT AND HISTORY OF CASE

Petitioner, Guido Iozzi, Jr., was tried under an indictment filed by the Federal Grand Jury of the District of Maryland, three counts charging violations of the Hobbs Act, 29 U.S.C. § 186(b) and three counts charging violations of the Taft-Hartley Act, 18 U.S.C. § 1951. Petitioner was tried in Alexandria, Virginia pursuant to an order transferring the case from Baltimore, Maryland signed by the Honorable Alexander Harvey, II, District Judge for the District of Maryland. The jury returned a verdict of guilty to all six counts on February 14, 1969. Judge Harvey sentenced petitioner to a total of fifteen (15) years.

Petitioner appealed to the Court of Appeals for the Fourth Circuit and the case was heard on December 3, 1969 and decided on January 12, 1970. Rehearing was denied on February 2, 1970.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on February 2, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

29 U.S.C. § 186 provides in part:

> "(a) It shall be unlawful for any employer . . . or any person . . . who acts in the interest of an employer to pay . . . any money or other thing of value—

"(1) to any representative of any of his employees . . . .

"(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section."

18 U.S.C. § 1951 provides in part:

"(a) Whoever . . . obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by . . . extortion or attempts . . . so to do . . . in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

. . .

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

47 U.S.C. § 605 provides in part:

". . . and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; . . ."

Article 35, § 92 and § 93 *et seq.*, Code of Maryland provides:

"§ 92. Declaration of policy.

The right of the people to be secure against unreasonable interception of telephonic and telegraphic communications shall not be violated. The interception

and divulgence of a private communication by any person not a party thereto is contrary to the public policy of this state, and shall not be permitted except by court order in unusual circumstances to protect the people. It is further declared to be the public policy of this State that detection of the guilty does not justify investigative methods which infringe upon the liberties of the innocent.

§ 93. Interception of telephonic and telegraphic communications prohibited: exceptions.

(a) Except as otherwise provided in § 94 this subtitle or subsection (b) of this section, no person shall: (1) Obtain or attempt to obtain the whole or any part of a telephonic or telegraphic communication to which such person is not a participant by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, unless consent is given by the participants."

The applicable police ordinance of the City of Baltimore reads:

"Electronic Devices

Ord. 231, 1955-56, sec. 10A; Ord. 1332, 1957-58, sec. 10A. 20. Use regulated.

It shall be unlawful for any person in the City of Baltimore to use any electronic device or other device or equipment of any type whatsoever in such manner as to overhear or record any part of the conversation or words spoken to or by any person in private conversation without the knowledge or consent, expressed or implied, of that other person; . . ."

QUESTIONS PRESENTED

1. Whether reputation evidence and evidence of anonymous acts should be admissible in the Government's case in chief to show the reasonableness of the fear of the victims in a Hobbs Act case.

2. Whether evidence of threats of force or violence to a person's business or employees constitute evidence of fear of financial and economic injury under the Hobbs Act, when the Hobbs Act makes actual or threatened force *or* violence alternative ways of violating the act and, if not, was there a constitutionally fatal variance between the indictment and the proof at trial in this case.

3. Whether the admission into evidence of transcripts of recordings and recordings of telephone conversations without the consent of petitioner, when the state law of Maryland prohibits such divulgence without the consent of both participants, was proper.

4. Whether the recordings and transcripts of recordings of telephone conversations between petitioner and a government witness obtained through the use of a recording device attached to the receiver of the Government witness without the knowledge or consent of petitioner should have been excluded from evidence as violations of 47 U.S.C. § 605.

STATEMENT OF FACTS

I. Background

The three separate transactions formed the basis for prosecution of petitioner, and these transactions were a part of major change in the contractual relationship be-

tween the Baltimore Building and Construction Trades Council and various contracting companies. At the time the transactions in question occurred, the Council was attempting to force contractors to sign a Building Trades Agreement which would significantly improve the position of union construction workers in Baltimore. To compel the acceptance of the Building Trades Agreement, the Council often caused work stoppages on various jobs.

A. Counts I and II

The first two counts involved the Morrow Brothers Construction Company and two construction jobs. Count I charged extortion under the Hobbs Act and Count II charged the acceptance of a bribe under the Taft-Hartley Act. A Morrow Brothers warehouse job was stopped based on allegations of unsafe and unsanitary working conditions. Walter Goertz, the President of Morrow Brothers, was informed that if he signed the Building Trades Agreement the work stoppage at the Hochschild-Kohn warehouse would end. Once Goertz agreed to sign the Building Trades Agreement, the work stoppage ceased.

Morrow Brothers had also been awarded the contract for the Gilman Hall at the John Hopkins University. Under a previous agreement with the Council, Morrow Brothers had agreed to use all union labor on the Gilman Hall job. In successfully bidding on the job Morrow Brothers had used a bid of a non-union subcontractor, which was $60,000.00 lower than the lowest union subcontractor.

Petitioner and Goertz agreed to the payment of $10,000.00 so that the Council would not object to the

use of a non-union subcontractor. Goertz testified that he made this agreement because of fear of the petitioner and what the Council could do to his business. Goertz paid petitioner the $10,000.00 in a drug store in downtown Baltimore not very long after the agreement was made.

B. Counts III and IV

Counts III and IV involve Ames-Ennis, Inc., which refused to sign the Building Trades Agreement in April, 1967. In July, 1967 a picket line appeared at one of Ames-Ennis' construction sites. Petitioner and Mr. Ames had discussions about the signing of the Building Trades Agreement and the removal of the pickets at the stopped construction site. The discussions also involved the number of non-union subcontractors Ames-Ennis could use on the Baltimore Women's Detention Center if they signed the Buliding Trades Agreement. The bargaining ended with an agreement that Ames-Ennis would pay petitioner $20,000.00 and the Women's Detention Center would be exempted from the coverage of the Building Trades Agreement. Ames never paid petitioner the $20,000.00, but the Building Trades Agreement signed by Ames-Ennis had an exemption for the Women's Detention Center. Ames testified that he made the agreement with petitioner to avoid labor harassment on the Women's Detention Center.

C. Counts V and VI

Counts V and VI involve the Investment Building Joint Venture which was constructing the Investment Building in Towson, Maryland. The petitioner's contact with the

principals in this transaction included two conversations with a Cornelius Whalen, an investor in the Joint Venture, one phone conversation with Robert Whalen, another investor and a letter to E. T. Owens, Inc., the general contractor for the project. All the other contact was between the Joint Venture principals and Walter Skopp, the business agent for the Electrical Workers local. Skopp had hundreds of conversations concerning the Investment Building with its principals. Skopp made numerous representations to Cornelius Whale regarding labor and other problems on the Investment Building site, the payment of money for peace on the job and facts concerning petitioner's connections with the Mafia and petitioner's attitude towards Cornelius Whalen.

Construction began on the Investment Building in October, 1965 and progressed satisfactorily until January, 1966 when an informational picket line by the Plumbers local stopped work for eight days. A similar work stoppage occurred in June, 1966 because of a Steamfitters' picket line. Robert Whalen thought there was some electrical sabotage at the site. There were also some threats made to workmen on the site and a hangman's noose was hung from the porch of the site office. There was also evidence of some water sabotage at the site.

In the Spring of 1966 Skopp informed Cornelius Whalen that the payment of $30,000.00 would end the problems at the Investment Building site. That figure was reduced in stages to $3,000.00. In September, 1966 Whalen procured $3,000.00 in cash and it was delivered through intermediaries to petitioner and Skopp in a hotel in Baltimore.

II. Reputation evidence and evidence of anonymous acts

There was extensive testimony throughout the trial concerning petitioner's bad reputation and anonymous acts, either directly or indirectly, attributed to petitioner. This testimony was highly prejudicial, and must have influenced the jury, because it pictured the petitioner as a ruthless member of the Mafia who would stop at nothing to achieve his ends in shaking down contractors.

A. Reputation evidence

Mr. Goertz, the president of Morrow Brothers, testified that he thought that petitioner had a reputation as a "pretty tough character." Goertz went on to relate that he thought that petitioner was responsible for breaking into the trailer office of Ingleside Plumbing and Heating Company and the fact that the office was burned.

Cornelius Whalen, an investor in the Investment Building Joint Venture, testified that he was informed by Walter Skopp that petitioner was "tied" in with the Mafia, who were really going to organize Baltimore and make each contractor pay 1% of the total cost of every job for peace on the job. Whalen also testified that Skopp informed him that petitioner was really in trouble with "two Mafia boys" who had come into town unless Whalen paid money to petitioner so that the Mafia boys could get their cut. Whalen also testified that Skopp informed him that petitioner and his Mafia friends "would stop at nothing to see to it that they won their way, including the use of dynamite; any kind of sabotage; shutdowns; anything."

Paul Craddock, another contractor operating in the Baltimore area, testified that petitioner "had a bad

reputation—for being a tough man." Craddock also testified that he had heard references about petitioner's reputation which indicated that petitioner was responsible for sabotaging jobs in Baltimore being constructed by non-union contractors. Craddock also testified that he had heard that petitioner had a brother "they call an animal." Rudolph Linder, another Baltimore contractor, testified that he had heard that petitioner had "fought his way up in the union hall." Linder related a story he had heard about petitioner:

> "Well, I heard that—this was of course the story that was circulated pretty widely, that he just beat up the fellows that were in his way and literally took this Elmer Knox and pulled him through a pass window and threw him downstairs and then he had the job. This is the story as they tell it."

This story relates to the year of 1962 or before, whereas the indictment covered the period of time from 1966 through 1968.

B. Anonymous acts evidence

The burning of the Ingleside trailer office was attributed to petitioner by Goertz and Mr. Charles Ruth, president of Ingleside. There was no evidence introduced to establish directly that petitioner was responsible for this fire and the only evidence connecting petitioner to this fire was the suspicions of Goertz and Ruth.

Robert Whalen, president of E. T. Owens, Inc., the general contractor for the Investment Building job, testified that there was a deliberate slowdown in the erection of the structural steel on the project. He also testified that they had "a lot of harassment" and "minor acts

of sabotage, such things as temporary electric being pulled." He also said, "There was a lot of incidents where wires were cut, spark plugs removed from equipment, just harassing type of things . . ." Robert Whalen testified that he suspected that petitioner was responsible for these acts, but he indicated he had no direct information that petitioner was responsible for these acts.

Edward Griffith, vice president of the Investment Building Company and the owner's representative on the job, testified that there was sabotage on the Investment Building job including concrete being poured into plumbing conduits. Griffith also testified that there were veiled threats made to the workmen on the job including the hanging of a hangman's noose from the porch of the office at the site, which caused one of the plumber's superintendents to quit. Griffith testified to some extensive "water sabotage" in which sinks were stopped up and the water was left on over the weekend. This water sabotage caused about $18,000.00 of damage, according to Griffith.

Cornelius Whalen testified that the electrical system was shut down on occasion, and that some workmen would refuse to work on some days, including the steel workers and the "elevator people." Whalen also related the story about the hangman's noose. He testified that "they threatened the mechanical foreman on one occasion; they threatened his life and he quit the job." Whalen also testified concerning the water sabotage and the $18,000.00 of damages which resulted. Whalen testified that he suspected that petitioner was responsible for these acts, but that he did not know who was responsible.

III. Recorded telephone conversations

F. Pearson Ames, president of Ames-Ennis, Inc., and petitioner had a number of telephone conversations which were recorded by Ames. These were four conversations on July 14th, July 20th, July 21st and August 3rd of 1967. Some of these calls were placed by Ames and some by petitioner. In order to record the conversations Ames used a standard Norelco dictating machine which had a small adaptor for the purpose of recording calls. The adaptor was placed upon the telephone receiver with a rubber suction cup. A wire from the adaptor was plugged into the dictating machine, and once the machine was activated it could record from both the receiver or the speaker of the telephone. This adaptor was placed on the receiver on the side next to the hand holding the receiver. Ames never informed petitioner during any of these conversations that he was recording them through the use of the adaptor. Ames made these recordings for the purpose of using them in a complaint he filed with the National Labor Relations Board. The recordings or the transcripts of the recordings were in fact tendered to the National Labor Relations Board by Ames-Ennis, Inc.

REASONS FOR GRANTING THE WRIT

The Court of Appeals decided three important questions of federal law, which have not been, but should be, settled by this Court. This Court has not faced the question whether it is proper to allow the Government to introduce evidence of a defendant's reputation and evidence of anonymous acts to establish the reasonableness

of the fear of victims in cases involving extortion. This Court, nor any other Court of Appeals, has decided whether evidence of threats of force or violence is properly admissible to prove fear of financial and economic injury. This Court has not decided whether the use of a recording device attached to the receiver of a telephone constitutes an interception under 47 U.S.C. § 605. In addition, the Court of Appeals has decided an important question of state law in a way which conflicts with the state statute and the state court opinions interpreting the statute. This Court should consider the question so that federal courts can be instructed as to the proper treatment they should give to applicable state statutes.

I. REPUTATION EVIDENCE AND EVIDENCE OF ANONYMOUS ACTS

The Government was allowed to introduced extensive evidence of petitioner's reputation and evidence of anonymous acts for the purpose of showing the reasonableness of the fear of the victims of the extortion in its case-in-chief. The nature of this evidence is summarized in the Statement of Facts. The evidence links petitioner with the Mafia and pictures him as a man who will stop at nothing to achieve his goals. This evidence could only be highly inflammatory in the minds of the jury. Considering the Italian ancestory of petitioner, the mere mention of his connection with the Mafia must have created numerous images in the mind of the jury, which would have been highly prejudicial.

The origin of the requirement that the Government must prove, as an element of the crime, the reasonable-

ness of the fear of the victims in extortion cases was apparently *Nick v. United States,* 122 F.2d 660 (8th Cir. 1941) in which the court said at page 671:

> "The gist of the unlawful act is extortion. Extortion involves a state of mind as an element of an offense under the Act. Unless there is some form of compulsion (either physical or fear) there is no crime under this Act. If the exhibitors had paid this money of their own initiative and voluntarily there would have been no violation of the Act. It was, therefore, essential to show that such payment was under such compulsion. The existence of this compulsion might be proved in several ways but one proper way is to show the state of mind under which the committee acted."

This rule has been followed by a number of other circuits. See *Carbo v. United States,* 314 F.2d 718, 739-42 (9th Cir. 1963); *United States v. Tolub,* 309 F.2d 286 (2d Cir. 1962); *United States v. Kennedy,* 291 F.2d 457 (2d Cir. 1961) and *Bianchi v. United States,* 219 F.2d 182 (8th Cir. 1955). However, this Court has never rendered a decision in regard to this rule and its proper limitations.

Petitioner does not attack the requirement that the Government must prove the reasonableness of the victim's fear. Clearly, such a requirement is protective of defendants, since without any evidence of compulsion there is no extortion and unreasonable fear should never be sufficient compulsion to find a defendant guilty. However, the use of reputation evidence has historically been very limited as evidence in a criminal trial because of its prejudicial effort. See *Michelson v. United States,* 335

U.S. 469, 475 (1948). Thus it is clear that the use of reputation evidence to prove the reasonableness of a victim's fear can create a situation in which the jury becomes more concerned and influenced by the reputation of the defendant than by the other evidence in the case.

Petitioner submits that this was about what happened in his trial. The record is full of references to petitioner's reputation as a tough, mean character who had close connections with the Mafia and would not hesitate to do great violence to a person or his property to achieve his goals. In addition to evidence concerning petitioner's reputation, there was substantial testimony concerning anonymous acts attributed to the petitioner by various witnesses although there was virtually no circumstantial evidence to identify petitioner as the author of these anonymous acts.

Such evidence cannot help but influence the jury's view of the rest of the evidence in the case, whether they are instructed to consider such evidence only on the issue of the victim's state of mind or not. Justice Jackson stated the matter succinctly in *Michelson v. United States*, 335 U.S. 469, 475-476:

> "The state may not show defendant's prior trouble with the law, specific criminals acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overrid-

> ing policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion if issues, unfair surprise and undue prejudice."

Because of the dangers inherent in the use of reputation evidence in a criminal trial, the ability of the Government to use reputation evidence to prove the existence of a reasonable fear in the mind of the victim converts an element designed to be protective of the rights of a defendant into a Government weapon, which can be used and was used in this case to paint the defendant as a bad character in the minds of the jury. In other words the use of reputation evidence or any other highly prejudicial evidence to prove a reasonable fear must be balanced against the great prejudice which is inherent in such evidence.

Petitioner submits that a rule limiting the scope, content and type of evidence which can be admitted to prove the reasonableness of a victim's fear is needed. Due to the fact that many Courts of Appeals have adhered to the proposition that reputation evidence is admissible to prove state of mind without attaching any limitations of scope, content or type of evidence, this Court should consider the question and formulate a reasonable limitation on the admission of such evidence or repudiate the proposition altogether if reasonable limitations are impractical to formulate.

II. SCOPE OF PROOF UNDER THE HOBBS ACT

The second question advanced by petitioner concerns the scope of proof which is proper under the fear portion of the Hobbs Act and whether a proper construction of the Hobbs Act would establish a constitutionally fatal variance between the indictment and the proof at trial. If this Court rejects the Court of Appeals construction of the Hobbs Act, then the case should be remanded for a new trial under *Stirone v. United States*, 361 U.S. 212 (1960).

Petitioner strenuously argued during his trial and on appeal that evidence of threatened force or violence to persons and property introduced by the Government was improper because the indictment did not charge petitioner with extortion through the use of actual or threatened force or violence. Petitioner argued that he was charged in the indictment with extortion through the use of fear of financial or economic injury which only involved the threatened use or actual use of ordinary labor tools available to a labor leader. Petitioner argued that the introduction of such evidence amounted to a constitutionally impermissible variance between the charges in the indictment and the proof at trial under *Stirone v. United States*, 361 U.S. 212 (1960).

The Court of Appeals never reached the question of a variance because the court held that evidence of threats of force or violence was proper to prove a charge of extortion through the use of fear of financial or economic injury. The court distinguished the *Stirone* case from the instant case by explaining that the jury instructions in this case was a simple rendition of the language

of the statute and the jury instruction in the *Stirone* case allowed the jury to base its verdict on evidence supporting the charges in the indictment or evidence of facts not charged in the indictment.

A. Construction of the Hobbs Act

This Court should consider the question of the scope of the four separate ways of violating the Hobbs Act. The Court of Appeals effectively eroded any distinction between the different methods of violating the Hobbs Act. The court held that obtaining money through a fear of economic injury can be proven by evidence of threats of violence or force directed at a person's business property or his employees. The court refused to recognize the distinction made by Congress between different methods of violating the Hobbs Act.

The term "extortion" is defined by the Hobbs Act as follows:

> "The term 'extortion' means the obtaining of property from another, with his consent, induced by the wrongful use of actual or threatened force, violence, *or* fear, or under color of official right." (Emphasis added.)
>
> 18 U.S.C. § 1951(b)(2).

The extortion prohibited by the Hobbs Act can be committed in one of four different ways, i.e., by the wrongful use of actual or threatened (1) force, (2) violence, or (3) fear, or (4) under color of official right. The statute clearly set forth the four means by which extortion can be committed in the disjunctive, and the plain wording of the statute rebuts any contention that alleging extor-

tion by one of the four methods necessarily encompasses the other three methods.

At least one Court of Appeals has recognized that the Hobbs Act defines the methods of committing extortion in the disjunctive. In *Bianchi v. United States,* 219 F.2d 182, 194 (8th Cir. 1955) the court observed:

> "A careful reading of the instructions disclosed that the case was not submitted to the jury on charges of actual or threatened force or violence, but was submitted on *the fear portion of the extortion statute.*" (Emphasis added.)

Such a reading of § 1915(b)(2) of Title 18 does no more than give the statutory words their natural and plain meaning.

The construction given to the Hobbs Act by the Court of Appeals makes the scope of the fear methods of committing extortion large enough to encompass the force and violence portions of the statute. Petitioner respectfully submits that such a construction of the fear portion of the Hobbs Act, and more particularly the words "financial and economic injury" as found in the indictment, renders meaningless the distinction drawn in the Hobbs Act among the four methods by which extortion can be committed. It also renders meaningless the distinction repeatedly drawn in the reported cases between proof of financial and economic injury and proof of force and violence. See *United States v. Sweeney,* 262 F.2d 272 (3rd Cir. 1959); *Bianchi v. United States,* 219 F.2d 182 (8th Cir. 1955); *United States v. Compagna,* 146 F.2d 524 (2d Cir. 1945) and *Nick v. United States,* 122 F.2d 660 (8th Cir. 1941).

B. Constitutionally fatal variance

If it is determined that the Hobbs Act should be construed strictly and, more particularly, construed to limit the proof of a fear of financial and economic injury to evidence of the use of ordinary labor tools available to a labor leader, then petitioner's trial involved a denial of a substantial constitutional right. Petitioner was denied the right to be tried only on the charges presented in the indictment returned by the grand jury. See *Stirone v. United States, supra.* The grand jury only charged him with using fear of financial and economic injury, whereas the Government introduced evidence that petitioner used threats of force or violence to compel his victims to pay him money. This variance was substantial and highly prejudicial when one reviews the evidence introduced by the Government to show threats of force or violence. *Stirone v. United States, supra,* clearly calls for the ordering of a new trial to cure this fatal and prejudicial defect.

The attempt of the Court of Appeals to distinguish this case from the *Stirone v. United States, supra,* because of the difference in jury instructions failed to take into account a portion of the trial judge's charge to the jury. The trial judge instructed the jury that:

> "Under the law, fear of economic or financial loss can include the fear, on the part of a building contractor, of work stoppage, slowdowns, strikes or picketing as well as the destruction of property used in his construction work. It may also include fear of physical injury to workmen on a contractor's projects or of intimidation of such workmen."

These are compelling reasons for the ordering of a new trial under the holding of *Stirone v. United States, supra.*

III. STATE LAW

The third question presented is whether the admission into evidence of transcripts of recordings and recordings of telephone conversations without the consent of petitioner, when the state law of Maryland prohibits such divulgence without the consent of both participants, was proper. The state law of Maryland with regard to wiretapping is Article 35, § 92 et seq., Code of Maryland. The applicable provisions read as follows:

"§ 92. Declaration of policy.

The right of the people to be secure against unreasonable interception of telephonic and telegraphic communications shall not be violated. *The interception and divulgence of a private communication by any person not a party thereto is contrary to the public policy of this state, and shall not be permitted except by court order in unusual circumstances to protect the people.* It is further declared to be the public policy of this State that detection of the guilty does not justify investigative methods which infringe upon the liberties of the innocent.

§ 93. Interception of telephonic and telegraphic communications prohibited: exceptions.

(a) Except as otherwise provided in § 94 of this subtitle or subsection (b) of this section, no person shall:

(1) Obtain or attempt to obtain the whole or any part of a telephonic or telegraphic communication to which such person is not a participant by means of

> any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, *unless consent is given by the participants.* (Emphasis supplied.)

The law provides both criminal penalties for its violation (§ 99) and the exclusion of evidence seized in violation of Sections 92 and 93 (§ 97) in state courts.

The Court of Appeals of Maryland held in *Robert v. State,* 220 Md. 159, 151 A.2d 737, 743 held that the consent of both participants in a telephone conversation is required before divulgence is permissible. The Court of Appeals of Maryland specifically distinguished the state statute from the federal law as interpreted by *Rathbun v. United States,* 355 U.S. 107, 109 (1957). Here the petitioner did not consent to the recording or the divulgence of the recording. The applicable police ordinance of the City of Baltimore also prohibits any person from recording a private conversation without the knowledge or consent of the other person. (See Ord. 231, 1955-56, sec. 10A; Ord. 1332, 1957-58, sec. 10A. 20 labelled "Electronic Devices".)

The Court of Appeals held, in denying petitioner's petition for rehearing, that the recordings were admissible under well-settled principles. Petitioner strongly urges that to permit the federal government to make use of evidence obtained in violation of state law would resurrect the "silver platter" doctrine and cause needless conflict between state and federal courts. The avoidance of such conflicts is the principle upon which the "very essence of a healthy federalism" depends. *Elkins v. United States,* 364 U.S. 206, 221 (1960). The admission of evidence which was obtained in violation of state law

and which would be inadmissible in a state court frustrates state policy without justifiable cause. If evidence obtained in violation of state law is excluded from a federal court, there can be "no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation." *Elkins v. United States,* 364 U.S. 206, 222 (1960).

Both the respect towards the laws of a sovereign state which is implicit in the concept of federalism and the "imperative of judicial integrity" require that the recordings be excluded from evidence in a federal court. To do otherwise is, at the very least, to tolerate the commission of a crime in the presence of the court. *Lee v. Florida,* 392 U.S. 378 (1968).

IV. VIOLATION OF 47 U.S.C. § 605

The fourth question is whether the recordings and transcripts of telephone conversations should have been excluded from evidence as violations of 47 U.S.C. § 605. The recordings or transcripts, which were incriminatory, were recorded without petitioner's consent and admitted into evidence over his objections. The recordings were made with a device which was attached to the receiver of F. Pearson Ames' telephone. The use of such a recording device constituted an interception of the conversations of petitioner. The introduction of the recordings into evidence constituted divulgence of the conversations of petitioner. The consent of only one party to the conversation does not provide the authorization required by the statute. Hence, Section 605 of the Federal Communications Act was violated and the evidence obtained as a

result of the violation is inadmissible in a federal or state court. *Nardone v. United States,* 302 U.S. 379 (1937); *Benanti v. United States,* 355 U.S. 96 (1957) and *Lee v. Florida,* 392 U.S. 378 (1968).

The Court of Appeals summarily dismissed petitioner's argument concerning the violation of section 605 citing *Lopez v. United States,* 373 U.S. 427, 438; *Rathbun v. United States,* 355 U.S. 107, 109 (1957); and *Harris v. United States,* 400 F.2d 264, 267 (5th Cir. 1968). *Lopez v. United States, supra,* did not involve a wiretapping situation so it is of little value in resolving this issue unless one cites *Lopez* for the proposition that a defendant may not complain of recordings which merely corroborate the testimony of a witness. However the issue here is the propriety of the use of evidence which violates state law in a federal court and not a question of corroboration. *Rathbun v. United States, supra,* involved the use of an extension phone through which the police obtained the evidence introduced. An extension phone is a standard piece of telephone equipment and the use of such an instrument would not amount to an interception. In the instant case the recording device was not a standard piece of equipment.

This case does not involve listening in on a pre-existing extension. On the contrary this case involves the seizure and recording of the message before it reaches the ears of the intended receiver by the use of a mechanical recording device specifically installed for this purpose. It is clear that the conversations of Appellant were *intercepted* if any normal definition is accorded to the statutory language. Although this precise point has not been ruled upon by this Court, a trilogy of cases in this Court

fully support the Petitioner. *Schwartz v. Texas,* 344 U.S. 199 (1952); *Benanti v. United States,* 355 U.S. 96 (1957); *Lee v. Florida,* 392 U.S. 378 (1968).

In *Schwartz v. Texas, supra,* state agents, *with the permission of one party* to the conversation, recorded telephone conversations by the use of an induction coil connected to a record amplifier. This Court assumed for the purposes of the case that the conversations had been "intercepted" without authorization of the sender within the meaning of the act. 344 U.S. at 201. This Court then proceeded to hold Section 605 and its exclusionary penalties inapplicable to state proceedings, 344 U.S. at 203, 204, a holding later specifically overruled in *Lee v. Florida,* 392 U.S. 378, 384-386 (1968). The conduct in *Schwartz* was really indistinguishable from the conduct here—the use of an induction coil on a telephone handset used by one of the participants and installed with his consent. 344 U.S. at 300.

Petitioner appreciates that only a split second transpired between the time that the words were recorded and the time when they were heard by the other party to the conversation. The same would be true if the device had been placed on the telephone line miles from Ames' office. The electrical impulses transmitting a telephone conversation travel at the speed of 186,000 miles per second. The time interval between the interception of the message and when the message reaches the person to whom it is addressed will be insignificant in any case. It is the fact of the interception which is important.

The purpose intended and afforded by the statute is to protect the means of communication. *Goldman v. United States,* 316 U.S. 129, 133 (1942). The means of

communication would be subject to incessant harassment if the consent of one party constituted valid authorization for an interception. The integrity of the communication system can be preserved only by requiring the consent of both parties before a lawful interception may be made. Such an interpretation of the statute is not "merely meticulous reading of technical language." *Nardone v. United States,* 308 U.S. 338, 340 (1939). It is a construction of Section 605 which is essential to accomplish the purpose of the Act.

It is also consistent with practical experience. Extension telephones are in common use. It is a normal risk of telephoning that someone may be listening in on the call. *Rathbun v. United States,* 355 U.S. 107, 109, 110, 111 (1957). Certainly it is not contemplated normally that a mechanical recording device will be transcribing the conversation.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MELVIN M. BELLI,

Attorney for Petitioner.

OWEN P. O'DONNELL,

BELLI, ASHE, ELLISON, CHOULOS & LIEFF,

Of Counsel.

(Appendix Follows)

Appendix

United States Court of Appeals
For the Fourth Circuit

No. 13,455

United States of America,
Appellee,
vs.
Guido Iozzi, Jr.,
Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
Alexander Harvey, II, United States District Judge for the District of Maryland, sitting by designation.

Argued December 3, 1969 Decided January 12, 1970

Before SOBELOFF, BRYAN, and BUTZNER, Circuit Judges.

Owen P. O'Donnell (Melvin M. Belli, and Belli, Ashe, Ellison, Choulos & Lieff on brief) for appellant; and Donald E. Sharpe, Special Assistant United States Attorney (Stephen H. Sachs, United States Attorney, on brief) for appellee.

BUTZNER, Circuit Judge:

Guido Iozzi, Jr., was convicted on six counts of an indictment that charged violation of the Hobbs Act[1] and the Taft-Hartley Act.[2] We find in his numerous assignments of error no cause for reversal. Only two of the issues he raises require discussion. The others we affirm summarily upon consideration of the briefs, record, and oral argument.

I.

Iozzi asserts that the district court erred by denying his motion for a judgment of acquittal on the ground that the evidence was insufficient to support a verdict of guilty on Counts 1, 3, and 5 charging violation of the Hobbs Act. With respect to these counts, the government needed to introduce sufficient proof to establish that Iozzi obtained or attempted to obtain money from building

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[1]Title 18 U.S.C. § 1951 provides in part:

"(a) Whoever . . . obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by . . . extortion or attempts . . . so to do . . . in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

. . . .

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

[2]Title 29 U.S.C. § 186 provides in part:

"(a) It shall be unlawful for any employer . . . or any person . . . who acts in the interest of an employer to pay . . . any money or other thing of value—

"(1) to any representative of any of his employees . . . .

"(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section."

contractors with their consent by causing the contractors to fear financial and economic loss if they did not pay him, and that in doing so Iozzi obstructed, delayed, or affected interstate commerce. There is no need to recite all of the facts. Substantial evidence, viewed in the light most favorable to the government, tends to show Iozzi's guilt beyond a reasonable doubt. Accordingly, the district judge properly denied the motion for a judgment of acquittal. *Bell v. United States,* 185 F.2d 302, 310 (4th Cir.), *cert. denied,* 340 U.S. 930 (1951).

Iozzi was President of the Baltimore Building and Construction Trade Council, an association of some 25 local building trade unions. He used his position to foster the impression that he had sufficient power to slow down or stop construction projects unless his demands were met. With respect to Count 1, the evidence is clear that Iozzi demanded and received $10,000 in cash from the president of Morrow Brothers Construction Co. With regard to Count 3, he demanded, but did not receive $20,000 from Ames-Ennis, Inc., another general contractor. Iozzi dismisses these instances as simply garden variety bribery to permit the use of non-union labor by Morrow Brothers on a project at Johns Hopkins University and by Ames-Ennis on the construction of the Baltimore Women's Detention Center. Work stoppages and picketing on the contractors' other jobs, he asserts, had nothing to do with his demands for money, but, on the contrary, were designed to persuade the contractors to sign a new Building Trades Agreement. Iozzi, however, never explained this nice distinction to his victims. They quite justifiably believed that their difficulties with labor, Iozzi's demands for cash, and his insistence that they sign a new labor

agreement were inextricably mixed. The evidence discloses that Iozzi forcefully drove home the point that the alternative to the contractors' financial and economic loss was payment of the tribute he levied. His conduct transgressed the bounds of legitimate labor tactics and violated the Hobbs Act. *United States v. Provenzano,* 334 F.2d 678 (3d Cir.), *cert. denied,* 379 U.S. 947 (1964); *United States v. Postma,* 242 F.2d 488 (2d Cir.), *cert. denied,* 354 U.S. 922 (1957); *Bianchi v. United States,* 219 F.2d 182 (8th Cir.), *cert. denied,* 349 U.S. 915 (1955).

Count 5 involved the payment of $3,000 so construction of an office building in Towson, Maryland, could proceed. Walter Skopp, business manager of a local union of electrical workers, conducted the negotiations and made the demands for payment. He represented that he was acting for Iozzi, and that unless payment was received, the Mafia, with whom he said Iozzi was linked, would sabotage the job. Iozzi claims the evidence was insufficient to show that Skopp was his agent or that he authorized Skopp's extortion. The facts, however, do not sustain this claim. On one occasion Iozzi visited the job site, revealed that he was familiar with the labor problems and threatened more difficulties. When the payoff was made in cash through an intermediary, Iozzi appeared at the rendezvous with Skopp. Significantly, it was Iozzi, not Skopp, who pocketed the money and sent back a message through the intermediary that he, Iozzi, was not going to be bought by chicken feed like $3,000. Iozzi's receipt of the fruits of Skopp's extortion gives credence to the government's assertion that Skopp was Iozzi's agent. As Judge Learned Hand said of a similar situation, "There may be honor among thieves, but there is no maudlin munifi-

cence." *United States v. Compagna,* 146 F.2d 524, 530 (2d Cir. 1944), *cert. denied,* 324 U.S. 867 (1945).

Count Six charges a violation of the Taft-Hartley Act by Iozzi's acceptance of $3,000 from Allen & Whalen, Inc.[3] The Act makes unlawful all payments, with exceptions not pertinent here, from an employer to union officials. Iozzi contends that the evidence was insufficient to show that the payment was made by an employer. The proof disclosed that $3,000 was drawn in cash from the bank account of Investment Building Joint Venture, the owner of the building under construction. There is, however, no evidence that the joint venture was an employer. Cornelius Whalen, the principal investor in the joint venture, sent the cash to Iozzi. If this were all the government's evidence, Iozzi's contention might well have merit. But the proof also established that Cornelius Whalen was president of Allen & Whalen, Inc., the electrical contractor on the job. Skopp, the business manager of the local union of electrical workers, who arranged for the payoff from Cornelius Whalen to Iozzi, alluded to difficulties that Allen & Whalen, Inc., which operated a union shop, might encounter, as well as to sabotage of the job in general. Skopp and Iozzi were not concerned with the source of the cash. Their demands were made to Cornelius Whalen, whom they knew to be both a part-owner of the building and president of Allen & Whalen, Inc., an employer of workmen they represented. They also knew he was the person who sent the cash. The Act does not require the government to show that the money paid to a union representative came from the employer's funds.

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[3]Counts 5 (Hobbs Act) and 6 (Taft-Hartley Act) charged receipt of the same $3,000.

On the contrary, it prohibits receipt of money from any person acting in the interest of an employer.[4] Iozzi's guilt, therefore, was established by evidence from which the jury could find that he, knowing Cornelius Whalen was acting in the interest of the employer as well as the owner, nevertheless received money from Whalen.

II.

Iozzi also complains that Counts 1, 3, and 5 charged extortion through wrongful use of fear of financial and economic injury to the contractors' business, but that the proof showed threats of violence and force. This, Iozzi claims, constituted a fatal variance between the indictment and the proof. There is no suggestion that the evidence surprised Iozzi's lawyer, for through a bill of particulars and other pretrial proceedings, the government disclosed the nature of its case. Rather, Iozzi contends that the variance erodes the distinction between the ways a person may violate the Hobbs Act. Under the Act's definition, extortion can be committed by (1) force, (2) violence, (3) fear, and (4) under color of official right.[5] Fear of economic loss is sufficient to support a conviction under the Act. *United States v. Dale,* 223 F.2d 181, 182 (7th Cir. 1955). And since the proof must show that the victim's fear was reasonable, *United States v. Tolub,* 309 F.2d 286 (2d Cir. 1962), the government is not precluded from showing why he feared economic harm. The causes of fear are not restricted or qualified by the Act, *Bianchi v. United States,* 219 F.2d 182, 189 (8th Cir.), *cert. denied,* 349 U.S. 915 (1955), and no case excludes from coverage

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[4]Title 29 U.S.C. § 186(a) & (b), see n.2, supra.

[5]18 U.S.C. § 1951(b)(2); see n.1, supra.

of the Act fear of economic injury resulting from threat of force or violence to a person's business property or employees. Consequently, we hold that obtaining money through the fear of economic injury induced by threats of violence or force constitutes extortion under the Act. We find, therefore, no fatal variance between the charge and the proof.

Iozzi's reliance on *Stirone v. United States,* 361 U.S. 212 (1960), is misplaced. There the Hobbs Act indictment charged interference with commerce by obstructing shipments of sand into the state for a ready-mix concrete plant. But the trial court instructed the jury that guilt could rest on obstruction of shipments of steel from a mill being built with the concrete. The Supreme Court reversed because the defendant had been convicted upon a charge which had not been returned by the grand jury. Here, on the contrary, the court carefully followed the language of the indictment in charging the jury that in order to convict, it was essential for the government to show that Iozzi obtained money, or attempted to do so, through the wrongful use of fear of financial and economic injury to the contractors' businesses. We find, therefore, no deprivation of Iozzi's constitutional right to indictment by a grand jury.

The judgment is

AFFIRMED.

United States Court of Appeals
For the Fourth Circuit

No. 13,455

United States of America,
Appellee,

vs.

Guido Iozzi, Jr.,
Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
Alexander Harvey, II, United States District Judge for the District of Maryland, sitting by designation.

ORDER

In a petition for rehearing, Guido Iozzi asks us to reconsider two assignments of error which we disposed of by summary affirmance. The first is his complaint that the district court improperly admitted recordings of his telephone conversations with an employee of one of his corporate victims. The employee made the recordings and testified to their accuracy. Thus, the only function of the recordings was to preserve an accurate record of the conversations and corroborate the employee's testimony. Under well-settled principles the recordings were admissible. *Lopez v. United States,* 373 U.S. 427, 438

(1963); *Rathbun v. United States,* 355 U.S. 107, 109 (1957); *Harris v. United States,* 400 F.2d 264, 267 (5th Cir. 1968). Cf. *Hoffa v. United States,* 385 U.S. 293, 302 (1966).

Secondly, Iozzi asks us to reverse because the district court admitted evidence of anonymous violence. We find no abuse of discretion. The testimony sufficiently linked Iozzi with this terror.

The petition for rehearing is denied.

/s/ Simon E. Sobeloff
United States Circuit Judge

/s/ Albert V. Bryan
United States Circuit Judge

/s/ John D. Butzner, Jr.
United States Circuit Judge

Filed February 2, 1970,
Samuel W. Phillips, Clerk.

A True Copy, Teste:
Samuel W. Phillips, Clerk
By /s/ Margaret P. Johnson
Deputy Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1269

GUIDO IOZZI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Maryland, petitioner, at that time the President of the Baltimore Building and Construction Trade Council, was convicted on six counts charging violations of the Hobbs Act (18 U.S.C. 1951) and Taft-Hartley Act (29 U.S.C. 186) arising from his wrongful use of fear of financial injury, instilled by threats of force and violence, directed against various building contractors to obtain or attempt to obtain money from them. He was

sentenced to fifteen years' imprisonment. The court of appeals affirmed (Pet. App. i-vii), and thereafter denied a petition for rehearing with a further opinion (Pet. App. viii-ix).

Petitioner contends, *inter alia*, that the use of reputation evidence to show the reasonableness of the contractors' fear was prejudicial and that there was a fatal variance, as regards the Hobbs Act counts, between the indictment and proof. He asserts that the evidence showed that he created fear of economic loss by force and violence, whereas the statute makes the use of force and violence an independent means of violating the Act, which was not alleged in the indictment. These contentions are without substance, since the government is required to show that the victim's fear is reasonable, as to which evidence of the reasons for the fear is clearly relevant. Petitioner's claims in this regard are fully considered and amply answered in the initial opinion of the court below (see Pet. App. i-vii), on which we here rely.[1]

Petitioner also contends that, in view of the provisions of 47 U.S.C. 605, the district court improperly admitted tape recordings made of certain of his tele-

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[1] It should be noted that, although it is a truism that a defendant cannot be convicted on reputation evidence alone (*Michelson* v. *United States*, 335 U.S. 469, 475), such evidence has obvious pertinence in a case such as this where it tends to support a showing of fear on the part of the victim. See *United States* v. *Tropiano*, 418 F. 2d 1069, 1081 (C.A. 2), petitions for writs of certiorari pending, Nos. 1101, 1224, this Term. *Stirone* v. *United States*, 361 U.S. 212, on which petitioner seeks to rely (Pet. 17-21), is inapposite, for the reasons discussed by the court below (see Pet. App. vii).

phone conversations with an officer of one of the construction companies, which were made by federal agents with the consent of the other party to the conversation. Petitioner argues that the consent of one party to a telephone conversation does not prevent a recording thereof from constituting a prohibited "interception" of the conversation for purposes of the Communications Act. The authorities, however, are uniformly to the contrary. *United States* v. *McGuire*, 381 F. 2d 306, 314 (C.A. 2), certiorari denied, 389 U.S. 1053; *Battaglia* v. *United States*, 349 F. 2d 556, 559 (C.A. 9), certiorari denied, 382 U.S. 955; *Carnes* v. *United States*, 295 F. 2d 598 (C.A. 5), certiorari denied, 369 U.S. 861; see also *Rathbun* v. *United States*, 355 U.S. 107, 110. Petitioner's reliance on *Lee* v. *Florida*, 392 U.S. 378, involving a party-line telephone, is not well grounded, since in that case there was no consent to the recording.

Petitioner also urges that the admission of the tapes was erroneous because Maryland law allegedly prohibits the recording of telephone conversations unless both parties thereto concur. See *Robert* v. *State*, 220 Md. 159, 168-171, 151 A. 2d 737, 741-743 (Ct. App. Md.); but see *Clark* v. *State*, 2 Md. App. 756, 237 A. 2d 768 (Ct. Spec. App. Md.). Assuming that Maryland law was violated, that did not render the evidence inadmissible. The admissibility of the tapes was a matter governed by federal law. *United States* v. *Martin*, 372 F. 2d 63, 66 (C.A. 7), certiorari denied, 387 U.S. 919; *United States* v. *McGuire*, *supra*, 381 F. 2d at 315; see also *Elkins* v. *United States*, 364 U.S. 206; *Wolfle* v. *United States*, 291 U.S. 7, 12-13.

As noted, federal law was not infringed by the actions of the agents in recording the conversations. Petitioner's claim that the holding below involves a resurrection of the "silver platter" doctrine (Pet. 22) is thus wide of the mark.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1970.

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